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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1026

STANLEY BLUMENTHAL, RUDOLPH WILLIAM JONES and WAYNE P. PASCHAL,

Petitioners,

against

UNITED STATES OF AMERICA and THE FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 15, 1963

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	16
EXHIBIT A	17
EXHIBIT B	24
Cases:	
Allgeyer v. Louisiana, 165 U. S. 578	7
Borrow v. F.C.C., 285 F. 2d 666, Cert. den. 364 U. S. 892	6, 9, 12
Briehl v. Dulles, 248 F. 2d 561 Rev'd 357 U. S. 116	14
Butchers Union Co. v. Crescent City Co., 111 U. S. 746	7
Chapman v. El Paso Natural Gas Co., 204 F. 2d 46 (C.A.D.C., 1953)	9
Cronan v. F.C.C., 285 F. 2d 288, Cert. den. 366 U. S. 904	6, 9, 12
Cummings v. Missouri, 4 Wall (71 U. S.) 277	7
Federal Trade Commission v. Bunte Bros. Inc., 312 U. S. 349	9
Graham v. Richmond, 272 F. 2d 517 (C.A.D.C., 1959)	7
Greene v. McElroy, 360 U. S. 474	7

PAGE

Kent v. Dulles, 357 U. S. 116 ..... 7, 8, 15

Kim v. Rosenberg, 363 U. S. 405 13

Konigsberg v. State Bar of California, 353 U. S. 252 14, 15

Konigsberg v. State Bar of California, 366 U. S. 36 15

Matter of Lafferty, 23 F.C.C. 761 8

Meyer v. Nebraska, 262 U. S. 390 7

Mintz v. Baldwin, 289 U. S. 346 9

National Association for the Advancement of Colored People v. Alabama, 357 U. S. 449 12

Orloff v. Willoughby, 345 U. S. 83 13

Parker v. Lester, 227 F. 2d 708 (C.A. 9, 1955) 7

Speiser v. Randall, 357 U. S. 513 12

Stewart v. Dulles, 248 F. 2d 602 ..... 15, 16

Sweezy v. New Hampshire, 354 U. S. 234 12

Thomas v. Collins, 323 U. S. 516 12

Truax v. Raich, 239 U. S. 33 7

Watkins v. U. S., 354 U. S. 178 12

West Virginia Bd. of Ed. v. Barnett, 319 U. S. 624 12

Constitution:

Article 1, Section 9 ..... 2, 3

First Amendment 2, 3, 12, 14

Fifth Amendment 2, 3, 5, 6, 12, 14, 15

PAGE

Statutes:

28 U. S. C. § 1254 2

Communications Act of 1934, 47 U. S. C. § 151 et seq. 48 Stat. 1064 ..... 2, 3

47 U. S. C. § 151 3

47 U. S. C. § 303 (l) (m) 3, 4, 8, 10, 12

47 U. S. C. § 402 (j) 2

Public Law 351, 77th Cong. 11

Radio Act of 1927, 44 Stat. 1164 8

Congressional Material:

87 Cong. Rec. 6239, 77th Cong., 1st Sess. 11

Federal Communications Commission, Annual Report, 1961 8

Hearing on H.R. 2662, House Committee on Merchant Marine & Fisheries, 77th Cong., 1st Sess. .. 10

Hearing on H.R. 5074, Senate Committee on Commerce, 77th Cong., 1st Sess. 11

H.R. 10446, 76th Cong. 10

H.R. 2662, 77th Cong. 10

H.R. 3364, 77th Cong. 10

H.R. 5074, 77th Cong. 10, 11

Miscellaneous:

Federal Communications Commission Docket No. 5218 9

Federal Communications Commission Docket No. 11060 9

Federal Communications Commission Docket No. 11061 9

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No.

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UNITED STATES OF AMERICA and THE FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Stanley Blumenthal, Rudolph William Jones and Wayne P. Paschal respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on March 28, 1963, affirming orders of the Federal Communications Commission (hereinafter referred to as the Commission) dated July 11, 1962 and July 19, 1962.

Opinions Below

The opinion of the Court of Appeals is not officially reported and is appended hereto as Exhibit A, and the judgment of the Court of Appeals is appended hereto as Exhibit B. There was no opinion by the Commission.

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is March 28, 1963. It was entered on the same date. No application for a rehearing was made. Jurisdiction is conferred upon this Court by the Communications Act of 1934, as amended, 47 U. S. C. § 402(j) and by 28 U. S. C. § 1254.

Questions Presented

1. Whether the Commission is authorized by law to require that an applicant for an operator's license fill out a questionnaire, under oath, relating to his political associations and beliefs.

2. Whether the requirement of the Commission, that an applicant for an operator's license fill out, under oath, a questionnaire relating to his political associations and beliefs abridges the First Amendment rights of speech, belief and association of the applicant, constitutes a bill of attainder and an *ex post facto* law in violation of Article I, Section 9, of the Constitution and deprives the applicant of his right to due process under the Fifth Amendment to the Constitution.

3. Whether the Commission is or may constitutionally be authorized to deny an operator's license to an applicant who denies current or recent Communist Party membership but refuses to answer questions as to the more remote past in reliance on his Fifth Amendment privilege.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments and Article I, Section 9 of the Constitution.

The statute involved is the Communications Act of 1934, 47 U. S. C. § 151 *et seq.* the relevant portions of which are:

> "Sec. 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Chapter."
>
> * * *
>
> "Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * *
>
> (l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals of the United States as the Commission finds qualified,

except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments;

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means."

Statement of the Case

On February 13, 1962, petitioner Blumenthal filed with the Commission, applications for radiotelegraph second class and radiotelephone first class operator's licenses; on March 7, 1962, petitioner Jones filed with the Commission, applications for radiotelegraph second class and radiotelephone first class operator's licenses; on June 7, 1962, petitioner Paschal filed with the Commission an application for an advanced class amateur operator and station license (J.A. 1a, 2a).

Thereafter the Commission sent to each of the petitioners a letter directing that he answer, under oath, the following questions:

> (1) Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership;
>
> (2) Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political division thereof, by force or violence? If the answer is yes, list the organizations or groups and give the dates of membership. (J.A. 4a-6a)

On February 13, 1962, petitioner Blumenthal responded to the first question as follows:

> "I am not a member of the Communist Party and was not at the time I applied for a renewal of my second class radiotelegraph operator's license in 1958. As to the period prior to that date I decline to answer in accordance with the privileges granted to me under the Fifth Amendment to the Constitution of the United States."

He answered the second question in the negative (J.A. 4a).

On March 7, 1963, petitioner Jones responded to the first question as follows:

> "I am not a member of the Communist Party and was not at the time I was first requested to execute a questionnaire by the Commission."

It might be noted parenthetically that Jones was first requested to execute a questionnaire by the Commission in 1959 in connection with a prior application for a renewal of his license. He answered the second question in the negative (J.A. 5a).

On June 7, 1962, petitioner Paschal responded to the first question as follows:

> "I am not a member of the Communist Party. In view of the manner in which existing legislation has been utilized and the attitude of various governmental agencies in prosecuting and persecuting by *defacto fiat*, I must utilize my right under the Fifth Amendment of the Constitution to refuse to give comfort or aid to any inquisitorial activity regarding any past or present poli[illegible]l activity."

In response to the second question, he said: "The answer is the same as to question No. 1" (J.A. 6a).

The Commission dismissed all three applications on the ground that petitioners had failed to complete the answers to the questionnaires (J.A. 7a-10a). No issue has been raised as to the technical qualifications of the applicants. The Court of Appeals found that the reliance by petitioners on their Fifth Amendment privilege did not remove their cases from the controlling effect of its previous decisions in *Borrow* v. *F. C. C.*, 285 F. 2d 666, cert. den. 364 U. S. 892, and *Cronan* v. *F. C. C.*, 285 F. 2d 288, cert. den. 366 U. S. 904.

Reasons for Granting the Writ

1. This Court has held that the power of an administrative agency to inquire into a person's political activities and associations will not be implied from general statutory language which broadly defines the scope of the agency's powers. Especially is this true when, as in this case, there is no administrative or legislative history to justify such inquiry.

The leading case on the subject is *Kent* v. *Dulles*, 357 U. S. 116, where the Court held that the right of an administrative agency to inquire into the political activities of an applicant for a passport will not be implied from the general language of a regulatory statute. The constitutional right to travel, involved in the *Kent* case, is no more a basic and fundamental right than the constitutional right to engage in a lawful occupation. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Meyer* v. *Nebraska*, 262 U. S. 390; *Truax* v. *Raich*, 239 U. S. 33; *Cummings* v. *Missouri*, 4 Wall (71 U. S.) 277; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

The language of the *Kent* case, with but few modifications, might be applied to this case; the same is true of *Greene* v. *McElroy*, 360 U. S. 474, where the Court held that the industrial security program administered by the Defense Department was invalid because there was no clear authorization, either by Congress or the President, for inquiry into the political activity and association of industrial employees. As the Court there said:

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." (360 U. S. at 507)

To the same effect, see *Graham* v. *Richmond*, 272 F. 2d 517 (C.A.D.C., 1959).

So here, there is no legislative or other authority for the actions of the Commission which so closely impinge on our constitutional liberties.

2. There is in the present case, as in *Kent*, an administrative practice of long standing and, furthermore, a legislative history which makes it abundantly clear that the Commission does not have the power it claims.

Sections 303(1) and (m) of the Act, which relate to the issuance and revocation of licenses, are copied directly from the Radio Act of 1927 (44 Stat. 1164). There is no evidence that the Federal Radio Commission, the predecessor of the Commission, or the Department of Commerce, which originally issued licenses to radio operators, ever applied a political test to applicants or licensees or had ever manifested any interest in their political affiliations or activities. The application forms used by the Commission since its organization do not contain any questions relating to the political activities of an applicant (J.A. 6a).[1] Except for a single instance in 1954 (*Matter of Lafferty*, 23 F. C. C. 761)[2] there is no evidence that the Commission had ever addressed such ques-

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[1] The Commission has had ample opportunity to exercise the power it now claims. It has issued millions of licenses since its creation; there were, at the end of the fiscal year 1961, 2,282,148 licenses and permits outstanding. Over 300,000 applications are filed in an average year. (Annual Report, Federal Communications Commission, 1961, pp. 20, 133.)

[2] The Commission first submitted a political questionnaire to Lafferty in 1954. His case was widely regarded as a test case and, indeed, the Commission had it under consideration for three years before handing down an order holding that it had the authority to question applicants concerning their political affiliation. It is our understanding that Lafferty died pending an appeal from the ruling of the Commission and hence his case became moot.

tions to any applicant until 1958, when four applicants were asked the questions now at issue.[3]

There is thus a significant history of the failure of the Commission to assert the authority it now claims, at least prior to 1958. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352; *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51 (C.A.D.C. 1953). Even now, the Commission, we believe, addresses these questions to very few applicants.

It is not only on such negative evidence that petitioner relies. Both Congress and the Commission have, in the past, been in agreement that the Commission does not have the right it now asserts. Twice in its history the Commission has considered the establishment of qualifications for a license other than technical and citizenship requirements. In 1938, a proposal to modify the rules to permit the setting of "mental" and "moral" qualifications was dropped when objection was made on grounds of lack of authority. (See FCC Docket No. 5218, pp. 241, 253, 355; J.A. 9a, 10a). In 1955 a proposal was made to prohibit the issuance of radio operators' licenses to members of the Communist Party (Docket Nos. 11060 and 11061). Again, objection was made on grounds of lack of authority. Those proceedings have only recently been dismissed, having pended undetermined for about seven years (FCC Docket Nos. 11060 and 11061).

The relevant legislative history is equally significant as bearing on the Commission's lack of power. In 1940 and 1941 bills were introduced to amend the Communications Act to

[3] Two of those applicants, Borrow and Cronan, refused to answer the questions on the grounds that the Commission had neither the constitutional nor the statutory authority to ask them. When the Commission denied their applications both sought review in the Court of Appeals. The Court affirmed the decisions of the Commission and petitions for certiorari were denied in this Court. *Borrow* v. *F. C. C.*, 285 F. 2d 666, cert. den. 364 U. S. 892; *Cronan* v. *F. C. C.*, 285 F. 2d 288, cert. den. 366 U. S. 904.

give the Commission the right to refuse to issue a license to an applicant who was "subversive" and to suspend licenses of radio operators found to be "subversive". The bills (H.R. 10446, 76th Cong.; H.R. 3364, 77th Cong.) were referred to Committee and were not reported out.

In the 77th Congress, Congressman Dirksen introduced H.R. 2662, sections 107 and 108 of which provided that the Commission could deny a license to any radio operator if he were guilty of subversive activities.

Congressman Dirksen told a House Committee considering the bill that the Commission took the position that it had never inquired into the desirability of license holders in any respect other than technical qualifications and that there was no provision in the law for the revocation or denial of a license for subversive activities. Congressman Dirksen explained that his bill was intended to remedy this "defect". (Hearing on H.R. 2662, House Committee on Merchant Marine & Fisheries, 77th Congress, 1st Sess., Feb. 26, 1941, p. 10 *et seq.*)

The Dirksen bill was not reported out of Committee. However, a subsequent measure, H.R. 5074, 77th Congress, was designed to treat specially with the problem of allegedly subversive persons engaged as radio operators in the United States Merchant Marine. It proposed to amend the Communications Act to define a "subversive individual" and further to amend §§ 303(l) and (m) to prohibit the issuance of licenses for maritime service to subversive individuals and to authorize the suspension of licenses to such persons. This bill was reported favorably and was passed. Congressman Ramspeck, in discussing it on the floor of the House on July 22, 1941 said:

> "It developed that the present law does not give the Federal Communications Commission, which issues licenses to these operators, the right to make inquiry about anything except the technical qualifica-

tions of radio operators. This bill proposes to amend the Act so that they may inquire as to their character and their background.

"* * * If they find an applicant is a subversive individual or that there is a reasonable probability that he is, they can deny the applicant a license." (87th Cong. Rec. 6259, July 22, 1941, 77th Cong., 1st Sess.)

Before the Senate Committee on Commerce, a number of non-governmental witnesses testified on the House bill, all agreeing that the Commission had no power to deny licenses to "subversives". To the same effect was testimony by Admiral Hooper of the Navy Department and Secretary Stimson of the War Department (Hearing on H.R. 5074, Senate Committee on Commerce, 77th Cong., 1st Sess., pp. 71 and 75).

A memorandum was submitted to the Senate Committee by the Commission. The Commission did not discuss its lack of authority to investigate subversive activities of license holders; such lack of authority was assumed. Instead, it objected to the bill on the ground that it was not qualified to examine into the subversive activities of applicants, that its staff was not equipped for that purpose, that it had had no experience in that area, that it had no procedures which would make such investigations feasible, and that it preferred not to have the authority which the Act would give it. (Hearings, pp. 77-79.) See also a statement by the Maritime Commission, *ibid.* pages 79, 80.

The Senate thereupon abandoned H.R. 5074 and reported, instead, a bill which gave to the Navy Department the right to screen "subversives" employed as radio operators in the Merchant Marine. It further provided that this power should end with termination of hostilities. The bill was eventually enacted into law. (Public Law 351, 77th Congress)

3. There is also internal evidence within the Communications Act that the Commission does not have the power it now seeks to assert. Section 303(m) enumerates the grounds for the revocation of a license, and well known principles of statutory construction would require that such enumeration would exclude grounds not enumerated. Since political activities or membership in "subversive" organizations is not listed in subdivision (m), it would seem that the Commission does not have the power to revoke licenses for such reason. It would be anomalous that the Commission would have the right to deny a license to an applicant for reasons insufficient to justify a revocation.

4. This Court has had frequent occasion to consider the effect upon First Amendment freedoms of belief, activity and association of the kind of inquiry undertaken by the Commission in this case. The language of the Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, at 462, is an eloquent statement of the vice inherent in the kind of political inquiry which the Commission here seeks to make. See also *Watkins* v. *United States*, 354 U.S. 178; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Speiser* v. *Randall*, 357 U.S. 513. It is beyond the power of government officials to determine what ideas are good or bad, or what organizations are good or bad. *West Virginia Board of Education* v. *Barnett*, 319 U.S. 624; *Thomas* v. *Collins*, 323 U.S. 516.

5. *Borrow* and *Cronan*, *supra*, both raised the question, in the Court of Appeals, of the Commission's right to put political inquiries to applicants for licenses, but this Court did not pass on the issues since certiorari was denied in both cases. This case differs from *Borrow* and *Cronan* in two respects: first, petitioners here denied current membership in the Communist Party as well as membership in the recent past and, second, petitioners Blumenthal and Paschal based their refusal to answer on grounds of their privilege under the Fifth Amendment, an element not present in the *Borrow*

or *Cronan* cases. Assuming, *arguendo*, that the Commission has authority to address political questions to applicants, the issue remains as to the procedure to be followed when the applicant, denying present membership, asserts his privilege as to past membership.

The Commission argued, and the court below held, that petitioners were not being compelled to disclose incriminatory matter—they were merely being asked to complete an application which sought ". . . information substantially relevant to [their] qualifications . . ." The court continued:

> "While . . . invocation [of the privilege] may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply." (Court of Appeals Opinion, *infra*, p. 22.)

The court, in support of its position, cited *Kim* v. *Rosenberg*, 363 U. S. 405, and *Orloff* v. *Willoughby*, 345 U. S. 83. In neither of the cases cited was the petitioner seeking to exercise a constitutional right, *i.e.* the right to engage in a lawful occupation. Both cases involved situations in which an unusual degree of discretion was lodged in the Government agency involved.

We respectfully suggest that the court's reasoning and that of the Commission is mechanical and fails to take into consideration the political realities of our time. Whatever may be its form, the substance of the procedure adopted by the Commission results in the disqualification of an applicant who relies on his privilege. The Commission agreed on argument that an applicant who answers these questions (whether in the affirmative or the negative) will either be granted a license or a hearing on his application. The petitioners got neither. In other words, their reliance on their privilege did result in a denial to them of a consideration of their applications.

It is unreal to treat the questions put to the petitioners as routine run-of-the-mill inquiries. They were not part of the regular application form and are asked of but a very few applicants. However we may seek to justify the action of the Commission in terms of its alleged need to get information to judge the qualifications of an applicant, the effect is to bar from the industry those who rely on their privilege in refusing to testify as to their political past. In the Court of Appeals decision in *Briehl* v. *Dulles*, 248 F. 2d 561 (reversed by this Court at 357 U. S. 116), Judge Fahy dissented because, on similar facts he construed "the factual situation as amounting to an actual denial of appellant's application on the ground that he refused to file" a statement as to his political association. We suggest that his dissenting opinion in that case is better reasoned than his majority opinion in this one.

The ruling of the Court of Appeals seems directly contrary to the decision of this Court in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, in which the Court held that the State Board of Bar Examiners could not, without violating the due process clause of the Constitution, draw an adverse inference as to character from a refusal to answer a question which was privileged.

Indeed, the position of petitioners is much stronger than that of Konigsberg. Admission to the bar calls for a much higher standard of character and fitness than employment as a radio operator, and courts have traditionally exercised extremely wide power over admission to the bar. The Commission, on the other hand, is seeking to exercise extraordinary powers in circumstances in which it had traditionally abstained from the assertion of such power. It will furthermore be noted that Konigsberg relied only on the First Amendment in his refusal to answer, whereas petitioners here rely on their privilege under the Fifth Amendment. Yet there is no doubt that in effect, if not in form, the Commission's ruling violated the holding of *Konigsberg*.

The principal problem which concerned the Court in the second *Konigsberg* case (*Konigsberg* v. *State Bar of California*, 366 U. S. 36), namely, that of balancing governmental against private interests, is not present here since this Court has never adopted the balancing test in a Fifth Amendment case. The dissents in the first *Konigsberg* case and the majority in the second took pains to note that no claim of Fifth Amendment privilege was involved. Thus, dissenting in the first case, Mr. Justice Harlan said:

> "There is no question here of drawing an unfavorable inference from a claim of the Fifth Amendment privilege. Petitioner repeatedly disclaimed any assertion of that privilege." 353 U. S. at 282, footnote 9.

And in the second *Konigsberg* case, the majority opinion said at p. 44:

> "We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a state from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having substantial relevance to his qualification."

And again, at p. 46, the Court premised its decision on the assumption "that there is no privilege here to refuse to answer."

6. In *Stewart* v. *Dulles*, 248 F. 2d 602, the Court of Appeals held that an affidavit denying present Communist Party membership or membership for the past fifteen years complied with the passport regulations, later held to be invalid in the *Kent* case, because those regulations spoke only in terms of present Communist Party membership. Here there are no regulations at all. All three petitioners have denied present membership and Blumenthal and Jones likewise denied membership since 1958 and 1959 respectively. As the

Court held in the *Stewart* case, we think that this, at the very least, would require the Commission to hold a hearing on the eligibility of the petitioners for licenses.

CONCLUSION

The petition for certiorari to the Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

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April 15, 1963

Exhibit A

OPINION

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17208

STANLEY BLUMENTHAL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

On Petition for Review of Orders of Federal Communications Commission

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Decided March 28, 1963

Mr. Victor Rabinowitz, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Joseph Forer* was on the brief, for petitioners.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, with whom *Messrs. Max D. Paglin*, General Counsel, *Daniel R. Ohlbaum*, Associate General Counsel, Federal Communications Commission, and *Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for respondents.

Before BAZELON, *Chief Judge*, and FAHY and WRIGHT, *Circuit Judges*.

FAHY, *Circuit Judge*: Petitioners Blumenthal, Jones and Paschal each applied to the Federal Communications Commission for a radio operator's license. Their applications were dismissed. They petition this court to review the orders of the Commission dismissing the applications. Our

jurisdiction is rested upon § 402(a) of the Communications Act, 47 U.S.C. § 402(a).

The dismissals were made on the ground that each applicant had failed to respond adequately to relevant questions, answers to which under oath had been requested by the Commission. The questions were as follows:

> 1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership;
>
> 2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence? If the answer is yes, list the organizations or groups and gives dates of membership.

Blumenthal answered question No. 1 as follows:

> I am not a member of the Communist Party and was not at the time I applied for renewal of my second-class radiotelegraph operator's license in 1958. As to the period prior to that date, I decline to answer in accordance with the privileges granted to me under the Fifth Amendment to the Constitution of the United States.

He answered question No. 2, "No."

Jones answered question No. 1 as follows:

> I am not a member of the Communist Party and was not at the time I was first requested to execute a questionnaire by the Commission.

He also answered "No" to question No. 2.

Paschal, who applied for renewal of his amateur operator's and station licenses, in answer to question No. 1 replied:

> I am not a member of the Communist Party. In view of the manner in which existing legislation has been utilized and the attitude of various governmental agencies in prosecuting and persecuting by defacto fiat, I must utilize my right under the Fifth Amendment of

> the Constitution to refuse to give comfort or aid to any inquisitorial activity regarding any past or present political activity.
>
> He gave the same answer to question No. 2.

The Commission advised the applicants that it was unable to act upon their applications until complete answers were given. The Commission advised also that any answers given would be considered in light of all the facts and circumstances, and that the applicants might submit with the answers any information which would help the Commission in finally disposing of the applications. Blumenthal and Jones requested hearings as to the sufficiency of the applications. The requests were denied because each applicant had been afforded such a hearing in connection with his earlier application, which had been abandoned, and also because the Commission relied on the intervening decision of this court in *Borrow* v. *Federal Communications Comm'n*, 109 U. S. App. D. C. 224, 285 F. 2d 666, *cert. denied*, 364 U. S. 892 (1960), as establishing the Commission's authority to require complete answers to the questions. Blumenthal and Jones failed to avail themselves of further time allowed to complete their answers, whereupon the Commission dismissed their applications, citing Section 303(*l*)[1] of the Act and Section 1.71(d) of its Rules.[2]

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[1] In pertinent part this statute reads as follows:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall . . .
>
> (*l*) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified. . . .

47 U.S.C. § 303.

[2] Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. . . .

47 C.F.R. § 1.71(d).

Paschal's application was also dismissed, on the ground that he too had not satisfactorily completed the questionnaire, the Commission citing in his case Section 1.506(b) of its Rules[3] in addition to Section 303(*l*) of the Act.

Since Jones did not invoke the Fifth Amendment his case is governed by our decision in *Borrow*, from which it follows that the order of the Commission dismissing his application will be affirmed on the authority of that case. And see *Cronan* v. *Federal Communications Comm'n*, 109 U. S. App. D. C. 208, 285 F. 2d 288, *cert. denied*, 366 U. S. 904 (1960).

As to Blumenthal and Paschal the contention is that since they invoked the Fifth Amendment their cases are distinguishable from *Borrow* and reversal is required.

This court in *Borrow*, followed in *Cronan*, decided that the questions were pertinent and relevant and that the Commission had authority to insist upon the information. Those cases further hold that First Amendment rights are not infringed by requiring answers to the questions. In *Borrow* we held that the applicant's failure to answer authorized the Commission to dismiss the application, not because the failure to answer considered alone was a reason for disqualification but because it withheld information the Commission was entitled to request and to receive; in other words, the application was not completed in important respects.

In contending that the exercise by Blumenthal and Paschal of their Fifth Amendment privilege not to answer fully, removes their cases from the controlling effect of *Borrow* and *Cronan*, appellants rely on *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957). There an applicant for admission to the state bar had refused to answer certain questions, and the Court held that no adverse inference as to character and loyalty could be based on such refusal. And the appellants contend that the decision in the second *Konigsberg* case, 366 U. S. 36 (1961), does not affect them adversely. In this

[3] The wording of this rule, 47 C.F.R. § 1.506(b), is the same as that of 1.71(d) set out in note 2, *supra*.

regard they rely on the following statement from the majority opinion in that case: "We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications." 366 U. S. at 44. It is urged that the Court's reference to "unprivileged answers" indicates that were the answers privileged, as here, failure to answer would not lead to denial of the application as unduly incomplete. We do not feel warranted in so interpreting this statement of the Supreme Court. In second *Konigsberg* the Fifth Amendment privilege was not interposed, so we cannot say the question of a "privileged answer" was actually decided. Considering that the Fourteenth Amendment imposes upon state action the same limitations the First Amendment imposes upon federal action, the Court held in second *Konigsberg* that the questions asked did not impinge upon rights of free speech and association protected by the Fourteenth Amendment.[4] In our case, however, there is the explicit Fifth Amendment privilege to refuse to answer. Petitioners accordingly had a constitutional right not to answer, whereas Konigsberg did not have the constitutional right which he asserted. The question remaining then is whether this requires a different result in our case, notwithstanding the refusal to answer has the same effect as it had in *Konigsberg*, and in *Borrow* and *Cronan*. It withholds from the Commission the aid and cooperation of the applicant in supplying information substantially relevant to his qualifications for the license. The Commission acts under the statutory standard of public interest in granting or denying an application, and *Borrow* holds that

[4] Appellants also argue in respect to *Konigsberg* that the license there involved was one to practice law for which good character has traditionally been regarded as pertinent. This argument goes to matters we have said were decided in *Borrow*, *supra*, and which we do not reconsider.

the information sought is relevant to a decision under that standard. We think withholding the information has no less effect when withheld under the Fifth Amendment privilege than when withheld as in *Konigsberg*.

The Fifth Amendment privilege protects a person who invokes it from self-accusation; but when he seeks a license at the hands of an agency acting under the standard of the public interest, and information substantially relevant to that standard is withheld under the privilege, as may be done, the need for the information and the cooperation of the applicant with respect to it remains. The agency cannot be required to act without the information.[5] To hold otherwise would carry the privilege beyond its purpose. While its invocation may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply. The effect is the same whether the refusal to supply it is based on the Fifth Amendment or on an unfounded claim under the Fourteenth Amendment.

Dismissal of an application for refusal of the applicant to fill the informational gap leads to an unhappy result. For it attaches significance to exercise of the privilege, and exerts pressure upon the applicant to waive it. Yet, on the other hand, there remains the inability of the Commission to obtain his help in supplying relevant information available to him. He applies for the license. The Commission cannot be required to act on his application without the relevant light he can supply and which the Commission is authorized to seek. It seems to us, therefore, that the failure to supply that light, though by resort to the privilege, is

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[5] Nor can the Commission, it seems to us, be required to come forward with evidence against the applicants before a license may be withheld, as has been suggested in argument. Such a contention implies that the licensing procedure is in actuality a proceeding against the applicants or at least one in the nature of an action between adverse parties.

cause for dismissal of the application as incomplete in significant respects. This is not an entirely satisfactory solution of the problem. For the application is lost when resort is had to the privilege. The application is sacrified though the privilege is preserved. To save both seems impossible. The choice is that of the applicant. Although no implication of guilt attaches to use of the privilege, other and indirect consequences are not altogether avoided. We are constrained to hold that this is the result we must accept, assuming the correctness of our *Borrow* decision that the questions were authorized and relevant. See *Kim* v. *Rosenberg*, 363 U.S. 405 (1960); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), particularly at 91.

Affirmed.

BAZELON, *Chief Judge*, concurring: Were we writing on a clean slate, I would hold—for the reasons given in Judge Washington's dissenting opinion in *Borrow* v. *Federal Communications Comm'n*, 109 U.S.App.D.C. 224, 228, 285 F.2d 666, 670, *cert. denied*, 364 U.S. 892 (1960)—that the Federal Communications Commission is not authorized to inquire into the political beliefs or affiliations of license applicants. But the court's decision there is controlling on that issue. Given the Commission's power so to inquire, the applicant's reason for refusing to respond becomes irrelevant. I therefore concur.

Exhibit B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1962

No. 17208

STANLEY BLUMENTHAL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

On Petition for Review of Orders of the Federal Communications Commission

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Before: BAZELON, *Chief Judge*, and FAHY and WRIGHT, *Circuit Judges*.

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on review herein are affirmed.

Per *Circuit Judge* FAHY

Dated: March 28, 1963.

Separate concurring opinion by Chief Judge Bazelon.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	3
Statement	3
A. Petitioners Blumenthal and Jones	3
B. Petitioner Paschal	5
C. The decision of the court of appeals	6
Argument	7
Conclusion	15
Appendix	16

STATUTES

Cases:

Adler v. *Board of Education*, 342 U.S. 485	10
American Communications Association v. *Douds*, 339 U.S. 382	15
Beilan v. *Board of Education*, 357 U.S. 399	10, 15
Borrow, Morton, 27 F.C.C. 783	7, 9, 13
Borrow v. *Federal Communications Commission*, 285 F.2d 666, certiorari denied, 364 U.S. 892	6, 9, 15
Cohen v. *Hurley*, 366 U.S. 117	14
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1	8, 11
Cronan v. *Federal Communications Commission*, 285 F.2d 288, certiorari denied, 366 U.S. 904	6
Didriksen v. *Federal Communications Commission*, 254 F.2d 354	9
Dispatch, Inc., 13 Pike and Fischer, R.R. 237	8
Garner v. *Los Angeles Board*, 341 U.S. 716	10
Kaufman v. *Hurwitz*, 176 F.2d 210	14
Kimm v. *Rosenberg*, 363 U.S. 405	14
Konigsberg v. *State Bar of California*, 353 U.S. 252	13

Cases—Continued Page

Lafferty, Travis, 23 F.C.C. 761 7
Lerner v. *Casey*, 357 U.S. 468 10
Nelson v. *County of Los Angeles*, 362 U.S. 1 14
Orloff v. *Willoughby*, 345 U.S. 83 14
Speiser v. *Randall*, 357 U.S. 513 15

Constitution, statute and rules:

First Amendment 6, 8, 14
Fifth Amendment 8, 12, 13
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:
Sec. 151 9
Sec. 303(l) 8, 11, 13
Federal Communications Commission Rules, 47 CFR:
Sec. 1.71(a) 9, 16
Sec. 1.71(b) 16
Sec. 1.71(c) 17
Sec. 1.71(d) 5
Sec. 1.506 17

Miscellaneous:

S.Rep. No. 2338, 85th Cong., 2d Sess. 12

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1026

STANLEY BLUMENTHAL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 17-24) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1963 (Pet. 24). The petition for a writ of certiorari was filed on April 15, 1963. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission, preliminary to passing upon petitioners' applications for radio operator licenses, asked them whether they were or had ever been members of the Communist Party. An affirmative answer to the question, in whole or in part, would not itself have disqualified the applicant from receiving a license; he would still have been entitled to a hearing (with the right to confrontation and cross-examination) to determine whether, on the basis of all the facts, grant of the license would be in the public interest. The petitioners stated that they were not then members of the Communist Party, but declined to answer whether they had ever been members—two of them basing their refusal to answer on the Fifth Amendment. The Commission dismissed the applications without considering the merits because of petitioners' failure to answer the questions completely. The following questions are presented:

1. Whether the Commission, to aid it in determining whether the grant of an application for a radio operator's license would serve the public interest, may require the applicant to furnish information about his past membership in the Communist Party.

2. Whether petitioners' rights under the First and Fifth Amendments were violated by dismissal of their license applications for failure to furnish such information.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in the petition (Pet. 3-4). The relevant portions of the Commission's Rules and Regulations are set forth in the Appendix, *infra*, pp. 16-17.

STATEMENT

A. *Petitioners Blumenthal and Jones*

Petitioners Blumenthal and Jones filed with the Federal Communications Commission, in February and March, 1962, applications for first-class radio telephone and second-class radio telegraph operator licenses (J.A. 12a-15a).[1] Their applications were accompanied by a questionnaire[2] containing the fol-

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[1] "J.A." refers to the joint appendix in the court of appeals.

[2] On December 1, 1961, the Commission had dismissed Jones' and Blumenthal's applications for renewal of operator's licenses after a hearing on the propriety of their refusal to answer questions relating to their membership in the Communist Party or groups advocating the violent overthrow of the United States. Both petitioners relied on grounds of constitutional privilege and lack of Commission authority in refusing to answer. The Commission held that the lack of this information precluded it from determining whether the grant of the applications would be in the public interest, and dismissed the applications without any determination on the merits. *Stanley Blumenthal, et al.*, 31 F.C.C. 1003, 1006. Petitioners appealed to the Court of Appeals for the District of Columbia Circuit. *Blumenthal* v. *Federal Communications Commission*, Case #16800 (C.A. D.C.). That case was dismissed on March 15, 1962, after petitioners had

lowing questions (J.A. 4a-5a):

> 1. Are you now or have you ever been a member of the Communist Party?
> 2. Are you now or have you ever been a member of any organization which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence?

Blumenthal answered the first question as follows (J.A. 4a):

> I am not a member of the Communist Party and was not at the time I applied for a renewal of my second-class radiotelegraph operator's license in 1958. As to the period prior to that date, I decline to answer in accordance with the privileges granted to me under the Fifth Amendment to the Constitution of the United States.

Petitioner Jones answered the first question (J.A. 5a):

> I am not a member of the Communist Party and was not at the time I was first requested to execute a questionnaire by the Commission.

Both petitioners answered the second question in the negative (J.A. 4a-5a). In addition, each appended a statement challenging the authority of the Commission to ask the questions (*ibid.*)

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abandoned their renewal applications and had filed new applications with an attached questionnaire which anticipated the Commission's request for this information.

The Commission wrote both petitioners, requesting that they completely answer the questionnaire, and pointing out that the applications would be subject to dismissal pursuant to Section 1.71(d) of the Commission's Rules, 47 CFR 1.71(d), if they failed to respond (J.A. 12a-15a).[3] Petitioners declined to complete their answers and requested a hearing (J.A. 18a). The Commission denied the request on the ground that both petitioners had been afforded a full hearing on the legality of their refusals to answer the same questions in connection with their earlier applications for renewal of their operators' permits (see note 2, *supra*) (J.A. 18a-19a). The Commission granted the petitioners additional time to respond (J.A. 19a), and, upon their failure to do so, dismissed their applications (J.A. 7a-9a).

B. *Petitioner Paschal*

Paschal applied for renewal of his advanced amateur station and operator license (J.A. 16a). The Commission asked Paschal to supply additional information and requested that he respond to the same questions asked of Blumenthal and Jones (*ibid.*). Paschal challenged the statutory authority of the Commission to ask the questions and answered both questions as follows (J.A. 6a):

> I am not a member of the Communist Party. In view of the manner in which existing legisla-

[3] Section 1.71(d) provides in pertinent part that failure to respond to a request for additional information will be cause for dismissal of an application. The dismissal is without prejudice where the application has not been designated for hearing.

> tion has been utilized and the attitude of various governmental agencies in prosecuting and persecuting by defacto fiat, I must utilize my right under the Fifth Amendment of the Constitution to refuse to give comfort or aid to any inquisitorial activity regarding any past or present political activity.

The Commission again asked Paschal to answer the questions. It set forth its authority to require such information, and explained that membership in the Communist Party would not necessarily disqualify him, but was one of many pertinent facts and circumstances which it would take into account (J.A. 20a-22a). Paschal did not reply and the Commission dismissed his application (J.A. 10a-11a).

C. *The Decision of the Court of Appeals*

The court of appeals (Judges Fahy and Wright, Chief Judge Bazelon concurring) affirmed (Pet. 17-23). The court held that its earlier decisions in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666, certiorari denied, 364 U.S. 892, and *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288, certiorari denied, 366 U.S. 904, established that the Commission had authority to seek the information, and that dismissal of the applications for failure to supply it did not violate petitioners' First Amendment rights. The court ruled that although petitioners were justified in relying on the Fifth Amendment in refusing to answer the question, the Commission was justified in dismissing the applications because of petitioners' failure to furnish relevant information. It stated (Pet. 22):

> The agency cannot be required to act without the information. To hold otherwise would carry the privilege beyond its purpose. While its invocation may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply. The effect is the same whether the refusal to supply it is based on the Fifth Amendment or on an unfounded claim under the Fourteenth Amendment. [footnote omitted]

ARGUMENT

The petition presents only the narrow issue whether the Federal Communications Commission may require an applicant for a radio operator's license to furnish information concerning his past membership in the Communist Party. Under the Commission's regulations and practice the fact that an applicant had been a Party member would not itself disqualify him from receiving a license, but would be merely one factor which the Commission would consider in determining whether he is qualified and whether grant of the application would be in the public interest. *Travis Lafferty*, 23 F.C.C. 761, 765-766. If any petitioner had answered the question affirmatively, he would have had the right to a full hearing, with confrontation and cross-examination, to develop all pertinent facts to show that a grant of a license to him would serve the public interest. *Lafferty*, *supra*, 23 F.C.C. at 770; *Morton Borrow*, 27 F.C.C.

783, 789, 790.[4] But since petitioners did not supply the information, there is no occasion to consider the weight which the Commission may give to past membership in the Communist Party in passing upon applications for radio operators' licenses. Petitioners must establish that the Commission had no authority to obtain the information in question for purposes of determining the underlying public interest question. We submit that the court of appeals correctly held that the Commission was justified in dismissing the applications because of petitioners' refusal to answer the question, and that such dismissals did not violate their rights under the First or Fifth Amendments.[5]

1. The Communications Act plainly authorizes the Commission to require applicants for radio operators' licenses to furnish information about Communist Party membership. Section 303(l) authorizes the Commission to "prescribe the qualifications of station operators" and to issue licenses to such "qualified"

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[4] In hearings of this nature, in order that the applicant will be "completely and thoroughly informed as to the evidentiary showing" which he will be required to meet, the Commission places on its counsel the burden of going forward with the evidence against the applicant, and requires the applicant "to refute specifically only those matters on which probative evidence was already introduced" by Commission counsel. *Dispatch, Inc.*, 13 Pike & Fischer, R.R. 237, 244.

[5] Since petitioner Jones did not rely on the Fifth Amendment in refusing to answer the questions, he cannot now rely on that Amendment as a justification for his refusal to answer. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107.

applicants "as public convenience, interest or necessity requires." The Commission has provided by regulation that an applicant must be found "qualified in respect to citizenship, character, and physical condition" (Section 1.71(a), Rules of the Federal Communications Commission, 47 CFR 1.71(a)). When read in the light of the congressional purposes in the Communications Act of furthering the "national defense" and "promoting safety of life and property" (47 U.S.C. 151), these provisions fully support the Commission's position that Communist Party membership (both past and present) of a radio operator is a relevant factor to consider in determining whether grant of a particular application would serve the public interest.

Commission-licensed radio operators occupy a strategic position in relation to the vital channels of radio communication and have opportunity to take action seriously detrimental to the public welfare. See *Didriksen* v. *Federal Communications Commission*, 254 F. 2d 354, 356 (C.A. D.C.); *Morton Borrow*, 27 F.C.C. 783, 787-788. As the court below explained in the *Borrow* case, which upheld the Commission's authority to require information as to past or present membership in the Communist Party or in an organization advocating or teaching the overthrow of the government by force or violence (285 F. 2d 666, 668-669):

> Radio beams are the operational essence of quick modern communication and of the control of modern weapons. Not only the power to

> use these electronic devices but the power to interfere with waves being used by others should, it might properly seem to the Commission, be lodged in those whose loyalty to the United States is made to appear.

The court there also stated (*id.*, p. 670):

> Membership in the Party *vel non* is a proper introductory query in this area; the answer may dispose of the subject, or it may necessitate explanation which, in turn, may or may not be acceptable.

Because of the crucial role which radio operators thus occupy in sensitive areas involving national defense, the present case is well within the principles applied in *Beilan* v. *Board of Education*, 357 U.S. 399, 405; *Adler* v. *Board of Education*, 342 U.S. 485, 493; and *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720, which upheld the relevancy of Communist Party membership in determining the "competency" or "fitness" of a teacher (*Beilan* and *Adler*) or the "reliability" of a subway operator. *Lerner* v. *Casey*, 357 U.S. 468, 473-475.

Past Party membership is also a pertinent factor for the Commission to consider in determining whether an applicant is qualified and whether grant of his application would serve the public interest. Its significance, of course, depends upon all the facts of a particular case—when the applicant joined the Party, in what circumstances, how long he remained a member, why and when he quit, how familiar he was with and how committed he was to the Party's prin-

ciples, and his present attitude toward the Party and its objectives. Past conduct with respect to Party membership "provides the illuminating context within which the implications of present conduct may be known" (*Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 69). If, for example, a particular applicant had quit the Party just before filing his application, that fact would certainly be relevant for the Commission to consider in passing upon the application.

Once it is recognized that information about past Party membership is pertinent to the Commission's decision on licensing applications, it necessarily follows that the Commission may require an applicant to submit such information and, if he fails to do so, may dismiss the application without determining its merits. In a particular case the Commission, upon obtaining all the facts, may conclude that despite past membership the grant of a license would be in the public interest. But the Commission, before it makes such a determination, is certainly entitled to obtain all information which bears upon the question.

Petitioners err in contending (Pet. 9-11) that the Commission and the Congress have recognized that the Commission cannot consider Communist Party membership in radio operator licensing proceedings. Indeed, the Commission took the contrary position before Congress in 1958, and Congress apparently acquiesced in that view. Section 303(l) was amended in 1958 to authorize the Commission to waive the statutory requirement, that station operators must be citizens, for non-citizens holding United States or

foreign aircraft pilot certificates. The House had proposed to require the Commission to find "that security considerations have been satisfied" before waiving the citizenship requirements. The Commission opposed this provision as unnecessary, on the ground that

> The Commission has previously interpreted public interest as encompassing authority to examine the character qualifications of persons seeking radio operators licenses and, where information is brought to our attention which might show that the issuance of such license would jeopardize the security of the United States, as authorizing this agency to refuse to issue such license. * * * The present statute requiring a license be issued only upon a finding that its issuance is in the public interest is sufficient to permit this Commission to deny license applications in those cases where security questions are involved, without requiring it to undertake the responsibility of making affirmative findings with respect to the security qualifications of each applicant which comes before it. [S. Rep. No. 2338, 85th Cong., 2d Sess., p. 5.]

The Senate Committee rejected the proposal, stating that its action did not relieve the Commission of its responsibility to "weigh the character qualifications" of applicants for radio operator licenses (*id.*, p. 3).

2. The fact that the refusal of two of the petitioners to furnish the relevant information was rested on a Fifth Amendment claim of privilege does not invalidate the Commission's dismissal of their applications for failure to supply the information. For

once it is established that the information sought is relevant to the Commission's exercise of its statutory duties under Section 303(l) and within the Commission's authority to obtain, it is immaterial whether the refusal to supply it was based on a Fifth Amendment claim or some other ground. As the court of appeals pointed out (Pet. 22), whatever the reason on which such refusal is based, it results in a "lack of relevant information * * * which the Commission is authorized to seek." The Commission was therefore justified in dismissing the applications for failure to supply necessary information.

In the present case, unlike *Konigsberg* v. *State Bar of California*, 353 U.S. 252, on which petitioners rely (Pet. 14), no adverse inference was drawn from the Fifth Amendment claim, and the Commission did not decide the merits of petitioners' applications. See *Morton Borrow*, 27 F.C.C. 783, 789, 790. It dismissed the applications solely because petitioners had failed to supply information which it needed in

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[*] The Commission there made clear that the "failure to reply is not utilized as * * * the basis of an adverse finding, but is of significance insofar as it prevents the Commission from making an affirmative finding that a grant of the application would be in the public interest as required by the act." *Morton Borrow*, 27 F.C.C. 783, 787, 789, 790. It further explained (*id.*, at 789) that where the Commission has doubts as to an applicant's qualifications, "it would be remiss in its duty if it failed to conduct such investigatory proceeding as its facilities permit before affirmatively concluding, as required by the act, that a grant of the application would be in the public interest" and that a "failure to respond to the Commission's interrogation deprives the Commission of facts on which to base the necessary" statutory conclusion.

order to determine whether their grant would be in the public interest. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, where the Court upheld the action of the President in denying an Army commission to a doctor, otherwise qualified, because he refused to answer questions about his membership in the Communist Party and other organizations under a claim of privilege. The Court stated (p. 91) that the President "before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness." See also *Kimm* v. *Rosenberg*, 363 U.S. 405; cf. *Nelson* v. *County of Los Angeles*, 362 U.S. 1; *Cohen* v. *Hurley*, 366 U.S. 117.

While it is of course true, as petitioners point out (Pet. 13), that their claim of the privilege subjected them to a disability not suffered by applicants who answer the question, this is no ground for denying the Commission the right to obtain information which it requires in the performance of its licensing function. There are many situations in which a valid invocation of the privilege may subject the person claiming it to a subsequent disadvantage; this fact, however, does not preclude asking the question against which the privilege is invoked. See, *e.g.*, the *Orloff* and *Kimm* cases, *supra*; see also *Kaufman* v. *Hurwitz*, 176 F. 2d 210 (C.A. 4) (discharge in bankruptcy denied to person who, under claim of privilege, refused to answer questions material to the statutory grounds for discharge).

3. Petitioners also contend (Pet. 2, 12) that the dismissal of their applications violated their First

Amendment rights. This point was fully considered and rejected in *Borrow* (285 F. 2d at 670), and the arguments made in our brief in opposition there are equally applicable here. See our brief in opposition in *Borrow*, No. 403, 1960 Term, pp. 19-20; see also, *American Communications Association* v. *Douds*, 339 U.S. 382, 391, 412; *Speiser* v. *Randall*, 357 U.S. 513, 527; *Beilan* v. *Board of Education*, 357 U.S. 399, 405.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1963.

APPENDIX

47 C.F.R.

§ 1.71 *Procedure with respect to commercial radio operator license applications.* (a) Upon acceptance for filing of an application for a new commercial operator license, an examination is conducted, where required, by the field office with which the application is filed in accordance with Part 13 of this chapter. If applicant passes the examination and is found qualified in respect to citizenship, character, and physical condition, the license will be issued. Where doubts as to citizenship, character, or physical condition arise, the application is referred to the Commission's Inspection and Examination Division, Field Engineering and Monitoring Bureau, Washington, D.C., for consideration. If it appears that further information is required to determine the applicant's qualifications or that a grant of the application will not serve the public interest, the applicant will be notified in writing and given an opportunity to furnish such written showings as the Commission may request and as the applicant may desire to submit. If, from the information furnished, it does not appear that the applicant is qualified or that the public interest would be served by a grant of the application, the applicant will be advised thereof in writing and given the opportunity to request, within the period of time to be specified in such writing, that the application be set for hearing. In case of failure timely to request such hearing, the application will be denied.

(b) Where an examination is not required, the application will be handled with respect to

other matters in accordance with the procedure in paragraph (a) of this section.

(c) Applications for renewal of license after acceptance for filing are handled in accordance with the procedure contained in paragraph (a) of this section, except that no examination is required unless the circumstances as set forth in § 13.28 of this chapter exist, in which case a renewal examination will be required.

(d) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for hearing; such dismissal may be made with prejudice after an application has been designated for hearing.

* * * * *

§ 1.506 *Dismissal of applications.* (a) Any application may, upon written request signed by the applicant or his attorney, be dismissed without prejudice as a matter of right prior to the designation of such application for hearing.

(b) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for a hearing; such dismissal may be with prejudice after an application has been designated for a hearing.

(c) Requests to dismiss an application without prejudice after it has been designated for hearing will be considered only upon written petition properly served upon all parties of rec-

ord and will be granted only for good cause shown. Such petition must be accompanied by the affidavit of a person with knowledge of the facts as to whether or not consideration has been promised to or received by petitioner, directly or indirectly, in connection with the filing of such petition for dismissal of the application.

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Supreme Court of the United States

October Term, 1962

No. 1026

STANLEY BLUMENTHAL, RUDOLPH WILLIAM JONES and WAYNE P. PASCHAL,

Petitioners,

against

UNITED STATES OF AMERICA and THE FEDERAL COMMUNICATIONS COMMISSION.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

One would never know, from a reading of respondents' brief, that petitioners' principal reliance is placed upon the decisions of this Court in *Kent* v. *Dulles*, 357 U. S. 116 and *Greene* v. *McElroy*, 360 U. S. 474. Those cases are not even mentioned by respondents nor is the principle for which they stand disgussed. The only possible reference to what we consider to be the central issue raised by the Petition is in the last paragraph of respondents' brief where reference is made to the Court of Appeals opinion in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666, at 670,

and to the briefs in opposition to the Petition for Certiorari in *Borrow*, No. 403, 1960 Term, pp. 19-20. But the majority opinion of the Court of Appeals in *Borrow* does not mention the *Kent* or *Greene* cases either; those cases are discussed only in the dissenting opinion of Judge Washington in *Borrow*, with which Judge Bazelon agreed in the instant case (see Petition for Certiorari, p. 23). 'Respondents' brief in opposition in the *Borrow* case, which is apparently incorporated in their present brief by reference, disposes of the *Kent* and *Greene* cases in a most cavalier and offhand fashion.

The vague statutory language [§ 303(1) of the Communications Act] upon which the respondents evidently rely provides no stronger foundation for the conduct of the Commission than did similarly general language relied upon by the Government in the *Kent* and *Greene* cases. See dissenting opinions in those cases.

II

Moreover, the Commission for 24 years after its creation recognized that § 303(1) did *not* give it authority to engage in political screening. The legislative material called to the attention of the Court at pages 9-11 of the Petition makes this abundantly clear. The respondents make no answer except to call attention to the position taken by the Commission in 1958. We agree that by 1958 the Commission's attitude had changed. That was the year in which the political questionnaire was submitted to Borrow and Cronan. But if the Commission had no legislative power to establish a political test in 1938, 1940 and 1941 (see Petition, pp. 9-11), the power could not have been created by the Commission's adoption of the program which gave rise to the litigation here under consideration.

III

Respondents make much of the "strategic position" occupied by Commission-licensed operators (Brief, p. 9). The same argument was made with equal intensity by the Government in *Kent* and *Greene*. "Examination of the Government's brief in the *Kent* case will disclose that the most dire consequences were predicted if the Secretary of State were denied the right to screen passport applications. And it will be recalled that Greene was Chief Executive Officer of a firm "whose business was devoted wholly to defense contracts with the United States" (360 U. S. at 511). Furthermore, it is difficult to see how the argument would apply to Paschal, who seeks only an amateur's license.

If, as we urge, the Commission had no statutory power to enact a political test, we cannot see how the nature of petitioners' work can affect the situation.

IV

Respondents persist in treating petitioners' "refusal * * * to furnish the relevant information" (Respondents' Brief, p. 12) in a formalistic and mechanical fashion, almost as though the petitioners were refusing to furnish their address or age. As we pointed out in the Petition (p. 12), this Court has long recognized the effect of such political questionnaires on the free exercise of rights in our democratic society. The particular question at issue here cannot be treated in a routine fashion; whatever rationalization may be adopted, the effect is to penalize those who seek to protest their privacy for the reasons stated by this Court in the cases cited in the Petition, and elsewhere.

This Court has, so far as we know, not passed on this issue in any case in which a suitor sought to exercise a constitutional right—in this case the right to engage in a lawful occupation. For that reason, if for none other, the Court should grant the Petition.

Respectfully submitted,

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May 23, 1963.